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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

RENEE YALLEY, ET AL., Plaintiffs and Appellants, v. LIBERTY LIFE ASSURANCE COMPANY OF BOSTON, ET AL., Defendants and Respondents.	A154076, A154803 (Alameda County Super. Ct. No. RG17856061)

Renee Yalley and Chris Anezinos appeal from a judgment of dismissal as to respondent, The Regents of the University of California (Regents), which the court entered after sustaining without leave to amend the Regents' demurrer to appellants' second amended complaint. Seeking to represent a proposed class of the Regents' employees, appellants alleged that (1) the Regents violated Labor Code sections 3751 and 3752 because, essentially, the earnings or savings the Regents obtained on the employees' contributions toward their supplemental disability benefits could possibly have been used to defray the Regents' costs of providing workers compensation benefits;[1] and (2) the employees were contractually entitled to their full supplemental disability benefits, without an offset for their workers compensation benefits. Acknowledging that

[1] Labor Code section 3751 requires employers to cover the full cost of workers' compensation benefits; Labor Code section 3752 generally precludes employers from reducing workers compensation benefits by other benefits the employee receives. Unless indicated otherwise, all statutory references hereafter are to the Labor Code.

sections 3751 and 3752 do not themselves create a right of action, appellants contend they nonetheless stated causes of action for declaratory relief, breach of an express contract, breach of an implied-in-fact contract, and unjust enrichment. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

A. Complaint and First Amended Complaint

Yalley and Anezinos (appellants) are former employees of the Regents. While employed, they opted to purchase coverage under a supplemental disability plan that was offered by the Regents and insured by a policy issued by Liberty Life Assurance Company of Boston (Liberty). Appellants contend they suffered workplace injuries, were awarded workers' compensation benefits, and received supplemental disability benefits, but pursuant to the terms of the policy those supplemental disability benefits were offset by the amount of their workers' compensation benefits.

Appellants filed a complaint against Liberty and the Regents in April 2017, claiming the offset was unlawful. The action was removed to federal court and later remanded.

After remand, appellants filed a first amended complaint, alleging breach of contract and eight other individual and class claims against Liberty, as well as a class claim of conversion against the Regents.

Liberty and the Regents each filed a demurrer to the first amended complaint. The court sustained Liberty's demurrer without leave to amend. The court sustained the Regents' demurrer on the ground that the conversion claim was barred by the exclusive remedy provisions of California's workers' compensation statute, but granted appellants leave to amend.

B. Second Amended Complaint

Appellants' second amended complaint asserted four new class claims against the Regents: declaratory relief; breach of express contract; breach of implied contract; and unjust enrichment.

1. Specific Allegations

The Regents pays for and provides to University of California employees a Short Term Disability Plan (STD). In addition, employees have the option to purchase coverage, at their own expense, under the Supplemental Disability Insurance Plan (SDIP) at issue here. The two plans are insured by a group disability policy issued by Liberty to the Regents (Policy). As employees of the University of California, appellants were allegedly third-party beneficiaries of the Policy.

a. Offset of Disability Benefits

The supplemental coverage under the SDIP provides benefits of up to 70 percent of eligible earnings, up to a maximum of $15,000 per month. Pursuant to the terms of the Policy, however, Liberty offsets these SDIP benefits with an employee's receipt of workers' compensation benefits.

b. Regents' Handling of Employee Disability Premiums

According to the second amended complaint, the Regents "properly" collect premium payments for SDIP benefits from University of California employees by deducting the amounts from the employees' pay checks, depositing the amounts in a "Treasurer's General Cash" account, and, 15 to 30 days later, paying those amounts to Liberty. Because funds in the Treasurer's General Cash account are not limited in how they can be spent, however, appellants alleged that the amounts employees paid as premiums, during the time those amounts remained in the Treasurer's General Cash account, were "available to [the] Regents to defray the cost of workers' compensation."

Appellants alleged on information and belief that, although premium rates for SDIP benefits are set forth by Liberty, they have been "manipulated so that employees' voluntary SDIP premium payments are used to pay" some or all of the Regents' premium for STD benefits, resulting in savings to the Regents that "*could* be used to defray the cost of workers' compensation for its employees." (Italics added.)

Appellants further alleged on information and belief that Liberty and the Regents have an agreement by which Liberty provides "case management and ongoing review" of the Regents' "UCRP Plan," which financially benefits the Regents regarding its STD

premiums, and the Regents "can" use these savings to defray the cost of workers compensation.

Appellants also alleged on information and belief that there are "other relationships" between Liberty and the Regents that benefit the Regents financially, providing money that "can" be used to defray the cost of workers' compensation.

Based on these allegations, appellants contended the Regents caused employees to contribute indirectly toward the Regents' workers compensation costs in violation of section 3751 and section 3752, and appellants and the class are entitled to recover the amount of the offset as damages. (In other words, employees would receive not only their full workers' compensation benefits and their SDIP benefits pursuant to the terms of the Policy, but also an additional amount equal to the offset.)

c. Regents' Policies

Appellants alleged that the Regents' standing orders and policies, including Board of Regents Policy 7200 defining "Total Compensation," created an express or implied contract entitling employees to this Total Compensation, including "the dollar value of the deduction/offset of California Workers' Compensation benefits they received from the SDIP benefits paid by Liberty." Appellants contended the Regents breached this contract, and the class suffered damages in the amount their SDIP benefits were offset by their workers compensation benefits.

2. The Regents' Demurrer to the Second Amended Complaint

The Regents filed a demurrer to the second amended complaint and requested judicial notice of documents including Regents Policy 1000, Regents Policy 7200, and Regents Policy 7201. Appellants opposed the demurrer, contending they had stated causes of action because they and other employees had paid indirectly for their workers' compensation benefits in violation of sections 3751 and 3752.

The court granted the Regents' request for judicial notice as to the existence and content of Regents Policy 1000, 7200, and 7201, and sustained the Regents' demurrer without leave to amend. The court found: appellants' declaratory relief claim failed because they did not allege an actual controversy between themselves and the Regents;

appellants' express and implied contract claims failed because they did not adequately allege any contract; and appellants' unjust enrichment claim failed because unjust enrichment does not constitute an independent cause of action and, in any event, appellants did not plead any violation of law or equitable principles that would provide a basis for restitution. Judgment was entered in favor of the Regents. This appeal followed.[2]

II. DISCUSSION

"In our de novo review of an order sustaining a demurrer, we assume the truth of all facts properly pleaded in the complaint or reasonably inferred from the pleading, but not mere contentions, deductions, or conclusions of law. [Citation.] We then determine if those facts are sufficient, as a matter of law, to state a cause of action under any legal theory. [¶] In making this determination, we also consider facts of which the trial court properly took judicial notice. [Citation.] A demurrer may be sustained where judicially noticeable facts render the pleading defective." (*Intengan v. BAC Home Loans Servicing LP* (2013) 214 Cal.App.4th 1047, 1052.) "In order to prevail on appeal from an order sustaining a demurrer, the appellant must affirmatively demonstrate error. Specifically, the appellant must show that the facts pleaded are sufficient to establish every element of a cause of action and overcome all legal grounds on which the trial court sustained the demurrer." (*Ibid*.)

A. Declaratory Relief (Count 10)

To state a claim for declaratory relief, a plaintiff must plead a proper subject of declaratory relief and an actual controversy involving justiciable questions relating to the plaintiff's rights or obligations. (Code Civ. Proc., § 1060; *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582.) An "actual controversy" includes a sufficiently probable future controversy between the parties, but does not

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[2] Appellants also filed a notice of appeal from the dismissal of their class action claims against Liberty (A154803). The two appeals were consolidated. Yalley and Anezinos subsequently settled and dismissed their claims against Liberty, and only their claims against the Regents are at issue in this appeal.

include controversies that are "conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court." (*Wilson*, at p. 1582.)

Here, appellants' allegations do not state a cause of action because they (1) fail to allege an actual controversy as to future rights and (2) fail to allege facts from which a violation of section 3751 or 3752 might be inferred. Either ground is sufficient to uphold the trial court's ruling. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)

1. Actual Controversy

"Declaratory relief operates prospectively to declare future rights, rather than to redress past wrongs." (*Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1497.)

As to appellants' individual claim for declaratory relief, the allegations are necessarily directed at past conduct because appellants are *former* employees. Accordingly, the allegations do not support a cause of action for declaratory relief. (*Linda Vista Village San Diego Homeowners Assn., Inc. v. Tecolote Investors, LLC* (2005) 234 Cal.App.4th 166, 181.)

As to a potential class claim for declaratory relief, no class has been certified. But even as to the putative class—ostensibly including current employees of the Regents—the allegations of the second amended complaint are framed solely in terms of the Regents' past conduct that purportedly resulted in past harm. Appellants alleged that the Regents "violated" sections 3751 and 3752 by "exacting" contributions and "taking" deductions from their earnings, for which appellants and the class allegedly "suffered" damages. Appellants sought a declaration that by these past contributions and deductions the Regents "violated"—past tense—sections 3751 and 3752. Appellants therefore failed to allege a proper basis for declaratory relief.

Appellants' arguments to the contrary lack merit. Their only argument worthy of mention here is their contention that declaratory relief may be proper even when a claim has fully matured, citing the following language from *Warren v. Kaiser Foundation Health Plan, Inc.* (1975) 47 Cal.App.3d 678 (*Warren*): "Any doubt should be resolved in favor of granting declaratory relief. [Citation.] While the court may refuse to entertain

the action where 'the rights of the complaining party have crystallized into a cause of action for past wrongs, [and] all relationship between the parties has ceased to exist . . . ' [citation], it may not exclude the action where the alternative remedy of suing upon the matured breach is not as 'speedy and adequate or as well suited to the plaintiff's needs as declaratory relief.' " (*Id*. at p. 683.) Here, however, the rights of appellants are stated in a cause of action for past wrongs, and there is no allegation that their relationship with the Regents continues. Even under *Warren*, therefore, appellants have failed to state a cognizable claim for declaratory relief.

Appellants further contend their pleading "can readily be amended to include all current employees." (Original underscoring.) However, they fail to explain how such an amendment would cure the defect. Appellants would still be former employees without any ongoing relationship with the Regents, and the allegations even as to all current employees would still point to past acts. (While current employees would have an ongoing relationship with the Regents, appellants are the named parties and putative class representatives.) In any event, the amendment would be futile because, as discussed next, the allegations establish no violation of section 3751 or 3752.

2. No Violation of Section 3751

Section 3751, subdivision (a) states: "No employer shall exact or receive from any employee any contribution, or make or take any deduction from the earnings of any employee, either directly or indirectly, to cover the whole or any part of the cost of [workers'] compensation." (§ 3751.)

Appellants have not alleged facts from which it may be inferred that the Regents received any contribution from its employees or took any deduction from their earnings that was used to reduce the Regents' workers' compensation costs. Although appellants allege that their payroll deductions for SDIP were "available" for use by the Regents during the 15–30 days those funds remained in the Treasurer's General Cash account, and that the Regents obtained some unspecified savings by contracting with Liberty for case management services and "manipulat[ing]" employee contributions for SDIP coverage, there is no allegation that the Regents *actually* used such earnings or savings to defray the

Regents' cost of workers compensation. Appellants cite no authority for the proposition that the mere availability of funds for *potential* use in reducing workers' compensation costs is prohibited by section 3751.

Appellants' reliance on *City of Los Angeles v. Industrial Acc. Com.* (1965) 63 Cal.2d 242 (*Fraide*) is misplaced. In *Fraide*, a city's account for paying disability pensions was funded by deductions from employees' salaries for disability pensions and the city's tax allocations. (*Id*. at p. 243.) The salary deductions and the city's tax allocations were not segregated or earmarked for a particular purpose, but a commission found that the disability pensions were in fact funded in part by the employees' salary deductions, and the city did not show otherwise. (*Id*. at p. 249.) After Fraide began receiving disability pensions from the city's fund, he also obtained workers compensation benefits. The city claimed that it should receive a credit against its workers compensation liability in the amount of its disability pension payments, pursuant to a charter provision. (*Id*. at pp. 243–244.) The court held that the city could take only a partial credit, commensurate with the proportion of the city's tax payments into the fund—not the deductions taken from the employees' earnings—or the city would run afoul of section 3751's prohibition against employee contributions toward workers compensation. (*Id*. at pp. 243, 253.)

The point of *Fraide* is that the city cannot use employee contributions to obtain an offset of its workers compensation liability. But there is no allegation in the second amended complaint that the Regents did this. It is not alleged that the Regents offset its workers compensation liability or costs with employee contributions; instead, it is alleged that the Regents obtained unspecified earnings or savings *on* the employee contributions, and the Regents *might* have been able to use the contributions, earnings or savings to defray the cost of workers compensation. Neither *Fraide* nor any of the other cases on which appellants rely hold this to be unlawful.

Appellants further argue that they "must not be required to turn over, in effect, their workmen's compensation awards, to the extent those have been paid for by their own contributions (even though indirectly), for the benefit of either the city or their

fellow employees or pensioners." (Citing *Cavoretto v. City of Richmond* (1969) 270 Cal.App.2d 726, 729 original underscoring.) But employees have *not* been required to turn over any workers' compensation benefits for which they paid. Although they receive less in *SDIP* benefits due to their workers' compensation award, that is pursuant to the Policy, without which appellants would not have any SDIP benefits at all. In short, employees receive in dollar value what they are entitled to get in workers' compensation benefits and what they are entitled to get under the terms of their supplemental disability plan.[3]

3. No Violation of Section 3752

Section 3752 generally precludes an employer from reducing workers compensation benefits by other benefits the employee receives. The statute provides: "Liability for [workers] compensation shall not be reduced or affected by any insurance, contribution or other benefit whatsoever due to or received by the person entitled to such compensation except as otherwise provided by this division."

Again, appellants did not allege that the Regents offset their workers' compensation benefits. Although they allege that the Regents are liable for the offset of their *disability* benefits, section 3752 does not apply to disability benefits. Appellants fail to show that the court erred in sustaining the demurrer as to their declaratory relief claim.

B. Breach of Express Contract (Count 11)

For their eleventh count, appellants asserted that the policies and standing orders of the Board of Regents, alleged in paragraphs 98–106 of the second amended complaint, along with "guidelines, administrative policies, and procedures developed by the [board] President pursuant to Regents Policy 1000, evince an intent by the Regents to create private rights of a contractual nature for 'Total Compensation' as defined in Regents

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[3] The second amended complaint alleges that Anezinos's workers' compensation benefit was paid directly to Liberty in violation of sections 3751 and 3752. Liability based on that payment was rejected by the court in sustaining the Regents' demurrer to the first amended complaint. Appellants do not urge that theory in their briefs in this appeal.

Policy 7200." In fact, they urged, their rights to this "Total Compensation" are protected by the contract clause of the California Constitution. Appellants further alleged that their "contractual rights to the 'Total Compensation,' as that term is defined by Regents Policy [7200], . . . includes the dollar value of the deduction/offset of California Workers' Compensation benefits they received from the SDIP benefits paid by Liberty."

As alleged in the second amended complaint, Regents Policy 7200, entitled "Policy on Definition of Total Compensation," reads in part: "TOTAL COMPENSATION shall be defined as: "All salary and other cash payments made to the employee or on behalf of the employee including but not limited to: base salary, stipends, incentive payments, bonuses, cash awards, automobile allowances, or any other cash payments that would be considered W-2 income to the employee. [¶] . . . [¶] Any benefits and perquisites including but not limited to: health & welfare benefits including, . . . or any other benefits or perquisites provided to the employee for services rendered to the University of California." Regents Policy 7200 is therefore inapplicable to appellants, who are not alleged to be entitled to executive compensation.

Moreover, Regents Policy 7200 does not promise any employees anything. It defines Total Compensation as including benefits that *are* "provided" to the employee, but it does not require any particular benefits *to be* provided, let alone SDIP benefits without the offset mandated by the Policy. There was no express contract for the provision of SDIP benefits without offset, and no contract entitling appellants or class members the recovery they seek.[4]

C. Breach of Implied Contract (Count 12)

For their twelfth count, appellants asserted that an implied-in-fact contract arose from the policies and orders alleged in their express contract claim. Appellants alleged

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[4] In their opening brief, appellants also argue that "Total Compensation" includes employer-paid basic *STD* benefits, so their rights to those benefits are impinged to the extent they are indirectly caused to pay for their own STD benefits. They do not point to any such allegation in the complaint, and such an allegation would be unavailing for the same reasons that their existing allegations are insufficient.

that, pursuant to the implied contract, appellants and class members "performed services and The Regents agreed to provide certain compensation and benefits." They further alleged that the Regents' breach of the contract damaged appellants in the amount of the offset of their SDIP benefits.

As discussed in connection with the express contract claim, the Regents' policies and standing orders did not promise SDIP benefits without offset or, indeed, any specific type of compensation or benefit. Therefore, if any implied contract arose as a result of the Regents' policies and the employees' services, it did not guarantee entitlement to the amounts appellants seek in their second amended complaint.

Furthermore, an implied contract will not be recognized if it would be inconsistent with the terms of an express contract. (*Series AGI West Linn of Appian Group Investors DE, LLC v. Eves* (2013) 217 Cal.App.4th 156, 169.) Here, the Regents offered appellants the option to purchase SDIP coverage insured by Liberty pursuant to the terms of the Policy. The Policy contradicts appellants' alleged implied-in-fact contract, because it defines Liberty as the insurer of appellants' SDIP benefits and states that appellants would not receive the SDIP benefit payments without offset. As appellants alleged, "the *SDIP plan* pays benefits in coordination with Workers' Compensation benefits…the SDIP benefits offset other income, including temporary disability benefits paid under Workers' Compensation." (Italics added.)

D. Unjust Enrichment (Count 13)

Appellants' thirteenth count was for "unjust enrichment." Appellants alleged that they and class members conferred a "benefit" on the Regents, the Regents accepted the benefit, it would be inequitable for the Regents to retain the benefit, the Regents was unjustly enriched, and therefore appellants and class members are entitled to restitution, including disgorgement of all monies unlawfully gained by the Regents from appellants and class members. As argued by appellants in their opening brief, the benefit the Regents received was the cost of workers compensation that the Regents illegally transferred to employees.

1. No Independent Cause of Action

Several courts have held that "unjust enrichment" does not constitute an independent cause of action, but merely describes a situation that merits the remedy of restitution. (E.g., *Everett v. Mountains Recreation & Conservation Authority* (2015) 239 Cal.App.4th 541, 553 [demurrer sustained because " 'there is no cause of action in California for unjust enrichment' "]; *Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779 ["Unjust enrichment is ' "a general principle, underlying various legal doctrines and remedies," ' rather than a remedy itself."]; *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387 [unjust enrichment is not a cause of action or a remedy].)

According to appellants, our Supreme Court has held that unjust enrichment *can* be an independent cause of action. (Citing *Ghirardo v. Antonioli* (1996) 14 Cal.4th 39, 47, 50–52 (*Ghirardo*); *Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C.* (2015) 61 Cal.4th 988, 998 (*Hartford Casualty*).) Indeed, the Ninth Circuit opined in *Bruton v. Gerber Products Company* (9th Cir., July 17, 2017, No.15-15174) 2017 WL 3016740, p*470, that *Hartford Casualty* "has clarified California law, allowing an independent claim for unjust enrichment to proceed in an insurance dispute." (*Ibid*.)

Neither *Ghirardo* nor *Hartford Casualty* squarely addressed the issue of whether there is an independent cause of action for "unjust enrichment." *Ghirardo* ruled that a party may seek relief "under traditional equitable principles of unjust enrichment," and cited a case that had concluded a "cause of action for unjust enrichment could be stated" under the facts, but the court did not disapprove the long list of precedent establishing that "unjust enrichment" would not suffice as an *independent* cause of action. (*Ghirardo, supra,* 14 Cal.4th at pp. 47, 50–52.) *Hartford Casualty* merely observed that an individual who has been unjustly enriched at the expense of another may be required to make restitution. (*Hartford Casualty, supra,* 61 Cal.4th at p. 998.) " 'A case is not authority for propositions neither considered nor discussed in the opinion.' " (*Sonoma Ag Art v. Department of Food & Agriculture* (2004) 125 Cal.App.4th 122, 127.)

2. Insufficient Allegations

Even if California does now recognize a cause of action for unjust enrichment (or restitution), appellants have not alleged one. While they claim in their brief that the Regents obtained a benefit based on their illegal transfer of the cost of workers compensation to employees, the second amended complaint does not contain facts that would give rise to an inference of such a transfer. There is no allegation that employee premiums for SDIP are actually used to defray the costs of workers compensation, or any facts from which a violation of section 3751 or 3752 may be inferred.

Furthermore, as appellants acknowledge, sections 3751 and 3752 do not reflect a legislative intent to create a cause of action. (See *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 305.) Under these circumstances, it would contravene public policy to allow appellants to obtain restitution based on a violation of those statutes. (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1595–1596 [because the Legislature has not created a private right of action for violation of relevant Insurance Code provisions, it would be against public policy to allow the plaintiffs to circumvent this limitation "under the guise of unjust enrichment"].)

Appellants fail to demonstrate error in the trial court's sustaining the demurrer without leave to amend.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BURNS, J.